No. 82-1453

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In The

Supreme Court of the United States

October Term, 1983

ERNEST BADARACCO, SR. and ROSE BADARACCO, ERNEST BADARACCO, JR. and BARBARA BADARACCO,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the filing of a non-fraudulent, amended return subsequent to the filing of a fraudulent original return commences the operation of the three year statute of limitations provided in section 6501(a), I.R.C. 1954; or, whether the unlimited period for assessment provided in section 6501(c)(1), I.R.C. 1954 continues to be the operative statutory authority once a fraudulent return has been filed.

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BRIEF FOR PETITIONERS

CITATIONS TO OPINIONS AND JUDGMENTS IN THE COURTS BELOW

Opinions:

Badaracco, et al. v. Commissioner of Internal Revenue, **Tax Court Memo. 1981-404 (Appendix D of Petition for Writ of Certiorari).**

Badaracco, Ernest, Sr. and Rose; Badaracco, Ernest, Jr. and Barbara v. Internal Revenue, ____ F.2d ____ (3rd Circuit, November 29, 1982), 50 AFTR 2d 82-6096 (Appendix C of Petition for Writ of Certiorari).

Judgments:

The judgment of the Third Circuit was entered on November 29, 1982 (Appendix B of Petition for Writ of Certiorari).

A petition for rehearing en banc was denied on December 20, 1982 (Appendix A of Petition for Writ of Certiorari).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit (Appendix B of Petition for Writ of Certiorari) was entered on November 29, 1982. A petition for rehearing was denied on December 20, 1982 (Appendix A of Petition for Writ of Certiorari).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

On May 16, 1983 this Court granted the petition for writ of certiorari.

STATUTES INVOLVED

Section 6501, I.R.C. of 1954 as amended:

> (a) [as amended by Sec. 165(a), Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, 72 Stat. 1275] *General Rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within

3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * *

(c) *Exceptions.*—

(1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

* * *

(3) *No Return.*—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Section 6653, I.R.C. of 1954 as amended:

(b) [as amended by Sec. 19(d), Revenue Act of 1962, Pub. L. No. 97-834, 76 Stat. 960, and by Sec. 313(e)(2)(B), Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 290] *Fraud*—If any part of the underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the

underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under section 6013, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse.

STATEMENT OF THE CASE

The issue presented in this appeal is whether the unlimited period of assessment provided for in section 6501(c)(1) of the *Code*[1] remains the operative authority when an amended non-fraudulent return is filed subsequent to there having been filed a fraudulent return.

This appeal follows the progression of these cases through the United States Tax Court (hereinafter the Tax Court) and the Third Judicial Circuit Court of Appeals (hereinafter the Third Circuit) based upon the following facts and judicial proceedings.[2] The taxpayers, Badaracco, had filed timely federal income tax returns for their taxable years 1965, 1966, 1967 and 1969. Their returns for the taxable year 1968 were filed late (March 28, 1969). Badaracco Brothers, the partnership in which Ernest Badaracco, Jr. and Sr. were members, filed its returns for the same years on the same dates as did the individuals. The partnership was engaged in the business of electrical contracting.

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1. Unless otherwise indicated, all references to the *Code* are to the Internal Revenue Code of 1954.

2. The facts recited herein are as such have been found by the Tax Court (Appendix D of Petition for Writ of Certiorari). Supplementary facts are referenced to the Joint Appendix (JA).

During 1970 and 1971 several grand juries had been impanelled in connection with activities in Hudson County in New Jersey, and the books and records of the partnership involving the Badaraccos were subpoenaed in connection therewith (JA20a). On August 17, 1971, the taxpayers filed non-fraudulent amended income tax returns and partnership information returns for each of the taxable years 1965 through 1969. The additional tax reported on the amended individual returns was paid at the time the returns were filed and was immediately assessed. On November 17, 1971 (three months after the amended returns were filed) Ernest Sr. and Ernest Jr. were indicted on fifteen counts under §7206(1) of the *Code*[3], accused of having filed both individual and partnership returns which they did not believe to be true and correct, for each of the years 1965 through 1969. The indictments were based upon the original returns and predicated upon the additional income shown on the amended returns. Both taxpayers entered a plea of guilty to the count relating to the charge for the year 1967 (JA24a). The remaining counts of the indictment were dismissed.

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3. SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) *Declaration Under Penalties of Perjury.*— Willfully makes and subscribes any return, statement, or other documents, which contains or is verfied by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

• • •

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

On November 17, 1977 (more than six years after the filing of the non-fraudulent amended returns) the Commissioner issued statutory notices of deficiency. Because the additional tax was paid with the filing of the amended returns, there was no further assessment to be made with respect to the tax. The notices of deficiency therefore, were directed only to the proposed assessment of the addition to the tax under section 6653(b) of the *Code*, the so-called fraud penalty of 50% of the deficiencies.

The Badaraccos petitioned the Tax Court for a redetermination of the statutory notices. While the case was pending before the Tax Court, the Tenth Judicial Circuit Court of Appeals (hereinafter the Tenth Circuit) was considering an appeal of the identical issue in *Dowell v. Commissioner* which had been appealed by Dowell from an adverse decision in the Tax Court [68 T.C. 646 (1977)]. In that case, the Tax Court had held in favor of the Commissioner's position that the subsequent filing of a non-fraudulent amended return after the filing of a fraudulent original return, did not trigger the operation of the general three year period of limitations under section 6501(a) of the *Code*. The Tenth Circuit reversed the Tax Court and established the precedent that an amended return which is non-fraudulent is entitled to the operation of the three year limitation period, even though the original return may have been false and fraudulent. *Dowell v. Commissioner*, 614 F.2d 1263, 45 AFTR 2d 80-855 (10th Cir. 1980).

The Tax Court, now once more faced with the issue in the instant cases and in another case (*Klemp*) which was also pending, reversed its prior ruling of *Dowell*, and followed the precedent of the Tenth Circuit. A written opinion of the full court was issued in *Klemp v. Commissioner*, 77 T.C. 201 (1981), on appeal (9th Cir. No. 81-7744) (Appendix E of Petition for Writ of Certiorari). The memorandum opinion in the instant cases simply followed the *Klemp* holding (Appendix D of Petition for Writ of Certiorari).

The Commissioner appealed the instant cases to the Third Circuit which reversed the holding of the Tax Court, and remanded the cases to the Tax Court (Appendix C of Petition for Writ of Certiorari). The decision of that Circuit placed it in conflict not only with the Tenth Circuit but also with the Second Judicial Circuit Court of Appeals (hereinafter the Second Circuit), which had followed the Tenth Circuit's opinion in affirming the United States District Court. *See Britton v. United States,* 532 F. Supp. 275, 49 AFTR 2d 82-472 (D. Vermont 1981), *aff'd without opinion* (2nd Cir. April 15, 1982). The writ of certiorari in the instant cases followed.

SUMMARY OF ARGUMENT

I. (a) The purpose and function of section 6501(a) of the *Code* is to provide a balance between the time required by the Commissioner to complete his administrative procedures for assessment of the tax, and the policy of repose to a taxpayer.

(1) Sections 6501(c)(1) and (3) of the *Code* are not statutes of limitations. They create no right of repose.

(b). The purpose of the unlimited time for assessment under sections 6501(c)(1) and (3) of the *Code* is to provide the Commissioner with the time necessary to overcome the deterrents placed in his way by a false and fraudulent return, or a failure to file; to overcome the disadvantageous position which has been created by the taxpayer.

(1) However, once the deterrent has been removed by the filing of an honest return then there is no longer any need for the unlimited time for assessment.

(c) The purpose and function of section 6501 of the *Code* is better served by an interpretation which favors the

commencement of a period of limitation, and a right of repose to the taxpayer.

(d) A statute of limitation is an almost indispensible element of fairness as well as of practical administration of an income tax policy. *Rothensies v. Electric Storage Battery Co., infra.*

(e) The facts in the instant case which show that, for whatever motive which impelled them, the taxpayers filed honest amended returns, which were accepted and acted upon by the Commissioner for both criminal and civil purposes; that all deterrents which had been created by the fraudulent returns were removed; and that the Commissioner waited for more than six years after the filing of the amended returns to propose a 50% penalty, compel the conclusion that to interpret section 6501 of the *Code* to permit no period of repose would be inequitable and unfair.

II. (a) The decisions of the Tenth Circuit in *Dowell, infra,* and the Tax Court in *Bennett, infra,* and *Klemp, infra,* correctly state the reasoning to support the conclusion that a non-fraudulent amended return albeit the original return was fraudulent commences the running of the general three year statute of limitations under section 6501(a) of the *Code.*

(1) The majority opinion of the Third Circuit in these cases, and the position of the Commissioner erroneously adopt the original position of the Tax Court in *Dowell, infra,* and fail to analyze the reasoning and analysis underlying the conclusion that the unlimited period for assessment has a purpose and once that purpose is satisfied, the reason for its existence ceases.

III. (a) A return which commences the statutory period of limitations to run is a return which meets the qualifications of being both a section 6501(a) return and the requirements of *Zellerback, infra; Lane-Wells, infra; Germantown Trust Co., infra;* and *Florsheim, infra.*

(1) By definition a false and fraudulent return cannot be a section 6501(a) return.

(2) A return which meets the definition of the aforesaid cases is one which evinces an honest and genuine endeavor to completely disclose the necessary information which is required in order that the Commissioner may perform his audit function.

(b) The majority opinion of the Third Circuit misinterprets the Tenth Circuit's reliance upon *Zellerback, infra;* and erroneously concludes that the basis for the decision of the Tenth Circuit was that the issue was resolved by the *result* in *Bennett, infra.*

(1) The influence of *Bennett, infra,* upon the Tenth Circuit was not its *result,* but the application of its *reasoning* with respect to the non-applicability of the continuation of the unlimited period of assessment.

IV. (a) The inquiry into the statutory interpretation is not satisfied by a mere literal reading of the statutory wording; but, because there is persuasive evidence to go beyond the words, an inquiry should be made into the statutory scheme.

(1) The conclusion of the majority opinion of the Third Circuit that there was a congressional intent to treat differently the situations of an original filing and the filing of a non-fraudulent amended return is not supported by statutory analysis.

(2) The approach to statutory interpretation utilized by Judge Hunter is the correct statutory analysis of this issue.

V. The position of the majority holding that "tax policy" considerations dictate the conclusion which it has arrived at does not find support in either the factual context of this case, or in

the application of the suggested considerations to a legal and logical resolution of the issue involved.

ARGUMENT

I.

The purpose and function of section 6501 of the *Code* is not served by an interpretation which results in there being no period of repose.

Section 6501 of the *Code* structures the statutory scheme of the statute of limitations for civil tax assessment and collection. Section 6501(a) sets forth the general rule that except as otherwise provided income taxes shall be assessed within a three year period after the return is filed. The exceptions are set forth in section 6501(c). There are two exceptions which are pertinent to our discussion. Section 6501(c)(1) provides:

> "(1) FALSE RETURN.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time."

Section 6501(c)(3) provides:

> "(3) NO RETURN.—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

The purpose of section 6501 is to provide a period of limitation within which the Commissioner may conduct his audit functions, before being foreclosed from making an assessment.

It also has the purpose of giving a taxpayer a right of repose. The court in *Britton v. United States, supra* described it in the following language:

> ". . . Section 6501 balances the policy to repose to the taxpayer with the purpose of providing the Commissioner of Internal Revenue adequate time to assess taxes and deficiencies. . . ."

Thus, under section 6501(a) the Commissioner is permitted a three year period to perform any audit functions and to assess the tax. However, should the taxpayer file a return which is false and fraudulent, or should he fail to file a return, he has placed the Commissioner in a disadvantageous position; he has placed a deterrent in the path of the Commissioner to perform his administrative functions. Because of this, Congress has provided the above exceptions of sections 6501(c)(1) and (3). These are exceptions to the right of repose granted a taxpayer. The exceptions are there in order to give the Commissioner time to ferret out the true facts with respect to the taxpayer's filing status. *Cf., Dowell v. Commissioner, supra. See The Colony Inc. v. Commissioner,* 357 U.S. 28 (1958), 1 AFTR 2d 1894.

The Tenth Circuit in *Dowell* defined the essence of section 6501. Whereas the statute of limitation in section 6501(a) stops the running of a prescribed period for assessment and provides a period of repose to the taxpayer, section 6501(c) is the "antithesis of a limitation concept, and in the absence of anything else, the commencement of any period of repose for fraudulent or evasive 'returns' is put in limbo."

Were it not for the fact that the Commissioner encourages, accepts and acts upon amended returns, the parameters between sections 6501(a) and 6501(c)(1) and (3) would be well defined. However, the Commissioner does accept such returns, and when

he does the question arises as to the impact of an honest amended return albeit a fraudulent return was originally filed, for an honest return removes the Commissioner from the disadvantageous position in which he was originally placed. The deterrent to his administrative function is removed. He now has all the information he needs in order to complete his assessment process. *Cf., Balkan National Insurance Co. v. Commissioner,* 101 F.2d 75, 22 AFTR 428, 431 (2nd Cir. 1939); *Stockstrom v. Commissioner,* 190 F.2d 283, 40 AFTR 1011 (Dist. of Col. Cir. 1950); *The Colony, Inc. v. Commissioner, supra.*

The Commissioner in the lower courts and in his brief in this Court with respect to the application for certiorari emphasizes the point that there is no statutory authority in the Internal Revenue Code for the filing of amended returns. He quotes from the recent opinion of this Court in *Hillsboro National Bank v. Commissioner,* ____ U.S. ____, slip op. 8 n.10 (March 7, 1983), 51 AFTR 2d 83-874 that the acceptance is "within the discretion of the Commissioner." He ignores the fact that in the instant cases the Commissioner has exercised this discretion; that he accepted the amended returns and acted upon them for both criminal and civil purposes. There is not present here the question of whether the amended returns should be accepted. Once accepted they took on the status of valid returns albeit they were amended returns. For this reason *Hillsboro, supra,* and cases cited therein are not apposite.

The issue before this Court therefore concerns the inquiry as to whether the statute of limitation provisions of the Internal Revenue Code are served by a literal interpretation which mandates that under no circumstances is there ever to be a period of repose; or, whether the balancing of the needs of the Commissioner against a policy of repose to taxpayers requires that once the needs of the Commissioner are satisfied, then the reason for the exceptions to section 6501(a) no longer exist, and therefore the statute is

better served by an interpretation which favors the commencement of a period of limitation. Later in this brief, a discussion of the decision in *Bennett v. Commissioner*, 30 T.C. 114 (1958) acq. 1958-2 CB 3, and the ruling of the Commissioner Rev. Rul. 79-178, 79-1 CB 435 will reveal that with respect to the unlimited period of section 6501(c)(3) there are circumstances which obviate that particular exception to section 6501(a). It remains for this Court to determine the question with respect to section 6501(c)(1).

The persuasive distinction made by the Tenth Circuit, which the government fails to recognize and which the Third Circuit did not discuss; namely, that section 6501(c)(1) is not a statute of limitation but the "antithesis" of such, is an important consideration to understand. For when it is understood that this issue does not entail the construing of a statute of limitation, but the effect of the subsequent filing of a non-fraudulent amended return upon the *exception* to the statute of limitation, then cases which favor strict construction of statutes of limitation in tax matters such as *Pacific Coast Steel Co. v. McLaughlin*, 61 F.2d 73, 11 AFTR 880 (9th Circuit, 1932), *aff'd*, 288 U.S. 426 (1933), 12 AFTR 11 and *Bowers v. New York and Albany Literage Co.*, 273 U.S. 346 (1927), 6 AFTR 6541 are not applicable. The inquiry is whether albeit a fraudulent return has been filed, if the Commissioner at a later date by means of an amended return is furnished with all the information he requires in order to make an assessment, and in fact does make the assessment, in all fairness is the taxpayer still to be denied repose. The purpose and function of a statute of limitation provision is to, in as fair and equitable way as possible, balance the needs of the Commissioner against the right of a taxpayer to repose. This is exactly what this Court stated in *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946), 35 AFTR 297:

> "It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have

> an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy."

It is to be observed that this absence of a period of repose in the civil process is in stark contrast to another section of the Internal Revenue Code which stipulates a defined period of limitation in the criminal process. Section 6531 of the *Code*.[4] The

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4. SEC. 6531. PERIODS OF LIMITATION ON CRIMINAL PROSECUTIONS.

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—
>
> . . .
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
>
> (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document);

(Cont'd)

incongruous result is that a taxpayer after six years, is given repose with respect to any criminal penalties; but, according to the Commissioner's position, is never given repose in a civil matter even if he cooperates in the collection process by filing an honest return. The cruelty of such reasoning is obvious from the facts in this case, for here the Commissioner reaped the fruits of an honest return. At the time the amended returns were filed, the taxpayers were not under personal investigation as to their original returns. Their books and records had been subpoenaed in conjunction with an investigation of certain activities in county government. Whatever may have been their motive, they decided to rectify their incorrect returns and they filed honest returns. The Commissioner accepted these returns as being honest and acted upon them. Simultaneously with the filing they paid their due taxes and were assessed. Three months after having filed, they were indicted, with these returns as the substance of the prosecution. The record is clear that the returns were honest and, having paid the liabilities disclosed thereon, there was no further determination by the Commissioner that they owed any further tax. The only remaining determination to be made by the Commissioner was that, in addition to the criminal penalties, the taxpayers were liable for the civil fraud penalty. This is a simple calculation of 50% of the additional tax which had been paid. Section 6653(b) of the *Code*. There was no longer any need for the Commissioner to have an unlimited period to investigate or audit the returns. His deterrent had been removed. Yet it required

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(Cont'd)

> (4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;
>
> (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents); . . .

more than six years after the amended returns had been filed to issue his statutory notice. Under the reasoning of the Commissioner he could have waited indefinitely to make his proposed assessment of the penalty. There would be no repose to the taxpayer. Forever, throughout his lifetime, he would live under an unexploded time bomb. This unfair and unreasonable result is described by Judge Wilbur in his concurring opinion in *Klemp:*

> ". . . Respondent would leave the statute open for that portion of eternity concurrent with the taxpayer's life, whether he lives three score and ten or as long as Methuselah. In most religions one can repent and be saved but in the peculiar tax theology of respondent no act of contrition will suffice to prevent the statute from running in perpetuity. Merely to state the proposition is to refute it, unless some very compelling reason of policy require visiting this absurdity on the taxpayer. . . ."

Judge Hunter in his dissent described it as the "Sword of Damocles."

It is submitted that section 6501 of the *Code* was never intended to have such an inequitable result. The Tenth Circuit in *Dowell* emphasized that "the 'at any time' assessment is not a further penalty" and that "no irrevocable forfeiture of the benefits of limitation period is contemplated as an additional punishment or penalty."

II.

The unlimited period for assessment terminates once the purpose for its existence is satisfied.

The issue of an unlimited period for assessment has been present in one form or another throughout the existence of tax law. *See Goodman,* 24 University of Cincinnati Law Review 70 (1955). The purpose for its existence has been generally agreed upon by the courts; namely, to allow the Commissioner the time to make an examination and perform his audit functions when the necessary information for determining liability is lacking. However, once the Commissioner has the necessary information and time to make the assessment then there is no further reason for its existence *cf., Balkan National Insurance Co.* and *Stockstrom, supra.* In *The Colony, Inc. v. Commissioner, supra,* this Court noted that the congressional purpose underlying section 275(c) of the Internal Revenue Code of 1939 was

> ". . . to give the Commissioner an additional two years to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item."

The Tax Court in *Klemp, supra,* noted:

> ". . . Similarly the purpose of section 6501(c)(1) is to provide the Commissioner with an unlimited amount of time when he is at a special disadvantage based on the taxpayer's fraud. . . ."

This question of the unlimited time for assessment while present in the above mentioned cases and others prior to *Dowell*

and *Klemp*, did not involve the precise situation which now confronts the Court. It remained for the case of *Bennett v. Commissioner, supra*, to furnish the precedent for the *Dowell* case and this particular situation.

One cannot ignore the strong influence of *Bennett* upon the question now before this Court. That case arose under section 276(a) of the Internal Revenue Code of 1939, which read as follows:

> "Section 276. Same-Exceptions.
>
> (a) False Return and No Return. In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

This section comprehended within the one provision, that which is now contained in sections 6501(c)(1) and (3) of the *Code*. *Bennett* involved a failure to file situation. Moreover, the failure to file was determined by the Tax Court to have been deliberate and fraudulent with the intent to evade tax (124). Delinquent returns were filed. The Commissioner's attempt to assess, was made more than three years after the filing of the delinquent returns, based upon his longstanding position that the unlimited period of assessment was not terminated by any action subsequent to the interdicted act. The Tax Court rejected this position stating:

> ". . . For, once a non-fraudulent return is filed, putting the Commissioner on notice of a taxpayer's receipts and deductions, there can be no policy in favor of permitting assessment thereafter at any time without limitation. . . ." (123).

The court concluded that the filing of the delinquent returns, even though the non-filing was false and fraudulent, commenced the running of the statutory period of limitation.

The *Bennett* case's influence upon this issue is reflected in the consideration given to it in *Dowell* and *Klemp*. When *Dowell* was before the Tax Court, the taxpayer relied upon *Bennett* only to have the court reject it as precedent, stating that it presented a different "situation." The Tenth Circuit, however, found the reasoning set forth (quoted above) to be "equally compelling" in a fraudulent return situation as in a fraudulent failure to file situation. When the issue once more came before the Tax Court in *Klemp*, the court quoted from its *Bennett* opinion and then held that it was also applicable to a fraudulent return situation.

The majority opinion in the Third Circuit in these cases reverts to the Tax Court's original position in *Dowell*, and ignores the reasoning of both the Tenth Circuit in *Dowell* and the Tax Court in *Klemp*. Specifically, the Tenth Circuit had stated that the question was not the distinction between a delinquent return and a fraudulent return, as had been made by the Tax Court in its *Dowell* opinion, but whether the delinquent return and the nonfraudulent return provided the Commissioner with all the required information so that there was no longer any need for an unlimited time for assessment.

The *Bennett* case has also had its influence upon the policy of the Commissioner with respect to section 6501 of the *Code*. Not only has he acquiesced in *Bennett* but as a policy matter he has adopted the reasoning of the case. Rev. Rul. 79-178, 79-1 CB 435. In the ruling, the statement is made:

> "The imposition of a civil fraud penalty under section 6653(b) of the Code does not necessarily indicate that tax can be assessed at any time under section 6501(c)."

Although the ruling is concerned with a non-filing situation, the policy, as indicated by the quoted language, does not restrict itself to subsection 6501(c)(3), but refers to the entire section 6501(c) of the *Code*. In effect, what the Commissioner is saying in the ruling is that the incidence of fraud is not necessarily connected with the unlimited period for assessment. It suggests that the controlling factor is whether a return when later filed, is itself not fraudulent; that the fraud, in order to maintain the unlimited period must be related to that particular return. It is apparent that the Commissioner recognizes that the unlimited period is not sacrosanct. However, his persistence in litigating the present issue is an indication that he fails to give recognition to the reasoning of the *Bennett* opinion; that is, that the delinquent return starts the commencement of the general statute of limitation because now he is possessed of all the necessary information in order to make his assessment. The Commissioner obviously insists that the governing law on the instant issue is the erroneous conclusion of the Tax Court in *Dowell*, that is making a distinction between a non-filing situation and a fraudulent return situation. However, the Tax Court recognized its error when it wrote the opinion in *Klemp*, and reiterated its true reasoning in *Bennett*.

The Third Circuit falls into this same error. Its decision reflects upon the distinction between the two situations. Nowhere does the Third Circuit refer to, or discuss, the line of reasoning or the cases which reflect the position that the unlimited period for assessment has a purpose, and once that purpose is satisfied, the reason for the existence of the unlimited period ceases. It does casually make reference to this as an argument advanced by the taxpayer, but it does not discuss it as the Tenth Circuit did in *Dowell*. In this, the Third Circuit is remiss for it misses the entire point of the issue. The Tenth Circuit cogently pointed out that rather than being concerned with the question of what is the statute of limitation, the specific question is whether there occurs an event which triggers the start of the statutory period.

III.

A non-fraudulent amended return is a return for purposes of section 6501(a) of the *Code*, albeit there was filed an original return which was subject to the provision of section 6501(c)(1) of the *Code*.

The purposes and spirit of section 6501(c)(1) of the *Code* being established, we inquire into the question of how and when the unlimited period for assessment ceases to exist, thereby triggering the operation of the general three year statute under section 6501(a) of the *Code*.

The threshold question is what constitutes a return for purposes of section 6501(a). Obviously a fraudulent return does not, otherwise section 6501(c)(1) would not be the operative provision. The answer is that in order for a return to be one which starts the running of the statute, it must be one which evinces an honest and genuine endeavor to completely disclose the necessary information which is required by law in order that the Commissioner may perform his assessment function. *Cf.*, *Zellerback Paper Co. v. Helvering*, 293 U.S. 172 (1934), 14 AFTR 688. In *Commissioner of Internal Revenue v. Lane-Wells Co.*, 321 U.S. 219 (1944), 31 AFTR 970, 972, this Court stated as follows:

> "Congress has given discretion to the Commissioner to prescribe by regulation forms of returns and has made it the duty of the taxpayer to comply. It thus implements the system of selfassessment which is so largely the basis of our American scheme of income taxation. The purpose is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical

> task of handling and verifying returns may be readily accomplished. . . ."

Germantown Trust Co. v. Commissioner of Internal Revenue, 309 U.S. 304 (1940), 23 AFTR 1084 involved a return which contained all the data from which a tax could be computed and assessed, but it did not compute the tax because it was filed on the wrong form. The Commissioner argued that it was not a return. This Court disagreed and held that it was a return because the mere failure to have computed the tax when all the necessary data and information was furnished fell "short of rendering it no return whatever." In *Florsheim Bros. Dry Goods Co., Ltd. v. United States*, 280 U.S. 453 (1930), 8 AFTR 10281, this Court when discussing a "defective or incomplete" return which could start the running of the statute of limitations emphasized that it is because such "defective or incomplete return purports to be a specific statement of the items of income . . . and, to have that effect, it must *honestly* and *reasonably be intended* as such." (italics supplied).

Contrary to the implication which appears in the majority opinion in the Third Circuit, the Tenth Circuit did not hold that the original returns were not returns for any purpose, but that such were not returns for purposes of section 6501(a) because they did not *start* a period of limitation. The statement of the court was:

> "The fraudulent returns . . . were really not 'returns' within the meaning of §6501(a) or *Zellerback*. They started no statute of limitations. . . ."

The inquiry as to what constitutes a "return" has been before the courts on many occasions. It would serve no purpose to survey the various types of documents which have been labeled as not being a return. These can range from unsigned returns to protester

returns and the application of *Zellerback* or any other case to these documents have no relevancy to the issue here. The specific inquiry here should not be directed at whether the original return was in effect a return, although the Third Circuit would appear to read *Dowell* in this fashion. The specific inquiry should be whether the amended return met the requirements of *Zellerback, Lane-Wells, Germantown* and *Florsheim*. Having removed the impediments which the original return created, and by so creating, placed the Commissioner in a disadvantageous position, the reason for the operation of the unlimited period for assessment no longer existed. Therefore, the amended return became a return for purposes of section 6501(a).

The Third Circuit misinterpreted the Tenth Circuit's reliance upon *Zellerback*. In footnote 4, it comments that *Zellerback* does not address itself to an amended return rendering the original return a nullity for purposes of the statute of limitations. But this was not the import of the Tenth Circuit's opinion. That court follows its quote from *Zellerback* with the statement:

> "Thus once the taxpayer has evinced an honest and genuine effort to satisfy the law by filing such a return, the §6501(a) period begins to run."

When the Third Circuit states that *Zellerback* does not render "the original return a nullity for the purpose of the statute of limitation" it makes a meaningless comment, for in order to be rendered a nullity there would have to have been the situation that it was once not a nullity. But this is not true, and no one would suggest that the original return was ever a return for the purpose of the statute of limitation. It was a return for purposes of the exception to the statute and that is why the Commissioner could, in the absence of the amended return, invoke section 6501(c)(1). What the Tenth Circuit said was that because the original return did not meet the tests of *Zellerback*, then it was

not a return for the purpose of section 6501(a). But whether it applied *Zellerback* to the original return or not, this would have been the correct label for the original return since it was false and fraudulent. It was a section 6501(c)(1) return, not a section 6501(a) return. The Tenth Circuit was really emphasizing *Zellerback* in relation to the amended return, and once this was established then the further application of *Colony, supra* and *Bennett, supra,* of the "no policy in favor of permitting assessment thereafter at any time without limitation" led it into its conclusion that the amended return was a return which started the running of the statute of limitations. This interpretation of the Tenth Circuit's opinion becomes clear from its statement:

> "The question would seem to be whether taxpayers have filed a return that meets the requirements of §6501(a) and *Zellerback,* not whether the return was 'original' or 'amended'."

It was from this erroneous interpretation of *Dowell* that the Third Circuit then compounded its error by concluding that the basis of the Tenth Circuit's decision was that the situation was resolved by the conclusion in *Bennett.* However, the opinion of the Tenth Circuit is clear that the influence of *Bennett* was not its *result,* but the application of the *reasoning* in *Bennett* with respect to the non-applicability of the continuation of the unlimited period.

The Tenth Circuit was no stranger to the inquiry of what constitutes a return for purposes of the statute of limitations. In an earlier case, it had before it a situation somewhat similar to the instant one in that the critical question was whether an amended return was a return for purposes of the statute of limitations, and the original was one which was not sufficient to start the period. *John D. Alkire Inv. Co. v. Nicholas,* 114 F.2d 607 (10th Cir. 1940), 25 AFTR 678. There the taxpayer had filed

an original return which failed to include rental income. Although there was no fraudulent intent connected with the omission, the factual pattern is the same as in the instant situation except for this fact. At a later date, an amended return was filed which included the income. Once more there is a parallel with the instant case. The position of the Commissioner was that because the original return did not disclose the information with respect to rental income, it was not a return which would start the period of limitation; but that the amended return which cured the lack of information was the effective return for statute of limitation purposes. As noted, except that in the instant case there is a fraud element involved, the cases are factually similar. It can be assumed that if in the instant case, the fraud feature was not imposed upon the original return, and the Commissioner had to rely upon the amended returns as a starting point, he would adopt the same position he did in *Alkire*. In holding that the amended and not the original returns triggered the statute of limitations, the Tenth Circuit made the following statements:

> ". . . Section 239 and 52 (I.R.C. 1926) supra, respectively required every corporation to make a return 'stating specifically the items of its gross income and the deductions and credits allowed* * *.' The burden was thus cast upon the taxpayer to furnish by return the information on which assessments were to be made. And by providing that the period of limitation should begin to run from the filing of the return, the statute manifested a clear legislative intent that the period should begin only when the taxpayer had furnished such information in the manner prescribed Florsheim Bros. Co. v. United States, 280 U.S. 453, 50 S. Ct. 215, 74 L. Ed. 542. Meticulous accuracy, perfect completeness, or absence of any omission is not exacted. But a return which fails

to comply in a substantial degree with the requirements of the statute in respect to disclosing the requisite information essential to the making of assessments does not suffice to start the period of limitations."

". . .While there was no intentional fraud, wilful negligence or purposed attempt at evasion of tax on the part of the taxpayer, the returns not only failed to disclose requisite information but were misleading and calculated to prevent discovery of material facts. Returns of that kind are not effective to start the period of limitation running. Compare Florsheim Bros. Co. v. United States, supra; Lucas v. Pilliod Lumber Co., 281 U.S. 245, 50 S.Ct. 297, 74 L.Ed. 829, 67 A.L.R. 1350; Germantown Trust Co. v. Commissioner, 309 U.S. 304, 60 S.Ct. 566, 84 L.Ed. 770; United States v. National Tank & Export Co., 5 Cir., 45 F.2d 1005, certiorari denied, 283 U.S. 839, 51 S.Ct. 487, 75 L.Ed. 1450; Myles Salt Co. v. Commissioner, 5 Cir., 49 F.2d 232; National Contracting Co. v. Commissioner, 8 Cir., 105 F.2d 488.

Since the assessments were made within the period of limitation after the filing of the so-called amended returns, they were not barred by limitation."

The conclusion to be drawn from the *Germantown, Florsheim, Lane-Wells* and *Zellerback* cases is that when a return honestly sets forth all the necessary information from which the tax can be computed and the assessment made, then it is a return for purposes of starting the running of the statute of limitations. The Tenth Circuit in *Dowell* pointed out that it is not pertinent

whether such a return is an original or amended document. With this as a conclusion, then the reasoning in *Bennett,* and adopted by the Tenth Circuit in *Dowell,* that "there can be no policy in favor of permitting assessment thereafter at any time without limitation" is sound law with respect to the situation in the instant case. In his dissent, Judge Hunter expressed this result as follows:

> ". . .The general rule, therefore, should govern. *Dowell* 614 F. 2d at 1265. That interpretation also avoids the distorted result reached by the majority. Under the majority's holding, once a fraudulent return is filed, the threat of future assessment of deficiencies will hang in perpetuity like the Sword of Damocles over the head of the taxpayer, despite his efforts to set the record straight."

IV.

The interpretation to be accorded to section 6501 of the *Code* requires more than a literal reading of the statutory provisions.

The opinion of the Third Circuit, in which the panel divided two to one, presents divergent interpretations of the effect of a non-fraudulent amended return upon the various provisions of section 6501 of the *Code.* Whereas the majority holds to a literal reading of the statutory scheme, quoting from Judge Hand that one should not lightly go beyond the plain language of a statute; the dissent postulates that merely reading the plain words in the present instance does not end the inquiry. Judge Hunter's approach is influenced by pronouncements of this Court which he quotes as follows:

> "4. While recognizing that '[t]he starting point in every case involving construction of a

> statute is the language itself.' *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J. concurring), the Court has recently admonished that 'ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. . . .' This is because the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' " *Watt v. Alaska,* 451 U.S. 259, 266 (1981), *quoting Boston Sand Co. v. United States,* 278 U.S. 41, 48 (1928).

Judge Hunter also employs Judge Hand to lend support to his approach to statutory construction. In footnote 2 he quotes as follows:

> "2. Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. *Cabell v. Markham,* 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd,* 326 U.S. 404 (1945)."

The literal approach employed by the majority ignores the issue in the case. Because it saw nothing on the face of the statute to demonstrate the effect of an amended return on section 6501(c)(1), it was content to end its inquiry. Both the *Dowell* and *Klemp* cases refer to legislative history, indicating that the courts

in those cases went beyond the mere words of the statute before rendering their decisions. Not only does the majority, aside from a few comments on the *Dowell* decision, appear to bypass the cogent arguments made by the Tenth Circuit in rejecting the Commissioner's position, but it also appears to ignore the statutory construction made by both the *Dowell* and *Klemp* cases.

Following the admonition of this Court as to statutory construction, the minority found "persuasive evidence" to go beyond the mere words of the statute. Judge Hunter recognized the troublesome area of inquiry by identifying the issue not to be the *clarity* of the words in the statute when the situation involves section 6501(c)(1), but the *lack of clarity* when the situation is effected by the filing of a nonfraudulent amended return.

The divergency in the conclusions arrived at by the Tenth and Third Circuits is explicitly demonstrated in their expressions of how they ascertained congressional intent. The Tenth Circuit criticized the position of the Commissioner for failing to recognize that sections 6501 (c)(1) and (3) are *in pari materia* and should be construed consistently with one another. The Third Circuit agrees with this reasoning. The Tenth Circuit then went on to review the legislative history which showed that the unlimited period for assessment for a fraudulent filing and for a failure to file have been included in the same subsection from the Revenue Act of 1921 to the Internal Revenue Code of 1954. The latter, however, while retaining both in the same subsection for some undisclosed reason placed them into separate subdivisions. The court made the conclusion.

> "Congress provided no indication that it intended statute of limitations treatment to differ between taxpayers who filed fraudulent returns, and those who fraudulently failed to file."

The Third Circuit ended up with the conclusion (footnote 6):

> ". . . we believe that Congress provided a clear indication in 6501(a) that it did intend 'statute of limitations treatment to differ between taxpayers who filed fraudulent returns, and those who fraudulently failed to file.' "

The Third Circuit gives undue consideration to the parenthetical clause of section 6501(a) in support of its conclusion that Congress has "differently" treated the filing of an original return which is filed late and a fraudulent original return. It quotes the clause: "(whether or not such return was filed on or after the date prescribed)" as support for its conclusion. This clause which first appears in the 1954 Code was merely a codification of existing law. *Cf., Automobile Club of Michigan v. Commissioner of Internal Revenue,* 353 U.S. 180 (1957), 50 AFTR 1967. There one of the questions before this Court was the date for the commencement of the three year limitation period with respect to a late filed original return. The applicable provision was section 275(a) of the 1939 Code, which, as noted, did not contain this provision. This Court interpreted said section as follows:

> ". . . The assessments were therefore within time under §§275(a) and 276(b)[14] unless, as the petitioner asserts, the statute of limitations began to run from the dates when, if there was a duty to file, the statute required filing.[15] The petitioner argues that because its omission to file on March 15, 1944, and March 15, 1945, was induced by the Commissioner's 1934 and 1938 rulings, it is only equitable to interpret the statute of limitations as running from those dates in the circumstances of this case. But the express condition prescribed by the Congress was that the statute was to run against

> the United States from the date of the actual filing of the return, and no action of the Commissioner can change or modify the conditions under which the United States consents to the running of the statute of limitations against it. In *Lucas v. Pilliod* Lumber Co., 281 U.S. 245, 249, 50 S.Ct. 297, 299, 74 L.Ed. 829, this Court held:. . . ."

The conclusion of the Third Circuit therefore, that there was a congressional intent as indicated by section 6501(a) to treat the two situations differently is not supportable. The parenthetical clause only reflects the long standing rule of law as enunciated by this Court, and cannot be said to have been placed in the 1954 Code because Congress had in mind a different treatment to be given to original and amended returns.

Had the non filing return in *Bennett* not been fraudulent there would not have been an issue, for the delinquent return would have started the period. The issue in *Bennett* was whether the general rule did not apply because the failure to file was fraudulent and therefore 276(a) did not apply. The *Bennett* case was not merely a matter of a delinquent filing, but a delinquent filing after a fraudulent failure to file.

One of the weaknesses in the Third Circuit opinion is the statement that there is nothing in the Internal Revenue Code which indicates that Congress intended parties who filed fraudulent returns to be permitted to take advantage of the general statute of limitations, and that such a person cannot escape the civil and criminal penalties or eradicate the fraud by merely filing a non-fraudulent return. Here the court appears to ignore the fact that such is equally applicable to the situation of a fraudulent non-filing. No one suggests that by reason of filing a non-fraudulent return the penalties or the fraud are eradicated. These penalties remain. The pertinent question is, does the non-fraudulent return

start the period of limitation, for if the Commissioner acts within this period, he can assess the penalties. The stigma of fraud once it attaches is never eradicated. What is eradicated is the possibility of assessment, and it is the assessment which is prohibited. But this is due to the Commissioner's own failure to act within the prescribed time, not to the return per se. For some reason the majority failed to understand this result, although it was quite clear to Judge Hunter (*see* footnote 7 of dissent).

Judge Hunter's opinion makes a strong case for statutory analysis which goes beyond the mere literal reading of the words of the statute. He found "sufficient persuasive evidence" in the form of amended returns which, while not being part of the explicit statutory scheme enacted by Congress have, nevertheless, been made "an integral part of the administrative scheme" by the Commissioner's regulations and policy; of a reasonable alternative interpretation of the statute as evidenced in *Dowell;* and, of the distorted results which would emanate from the majority's holding, to convince him that resort only to the literal reading of the statute was not a sufficient inquiry into the issue. This discerning jurist also raised a provocative inquiry when he questioned as to how the effect of amended returns upon the statute of limitations can be discerned solely from the literal language of the statute, when such are not part of the statutory scheme as enacted by Congress, but are a creation of the Internal Revenue Service. Because such are part of the administrative scheme rather than of the statutory scheme, the effect upon the statute of limitations must be analyzed by going beyond the literal reading of the statute.

When the related provisions of section 6501 are analyzed, rather than being read literally, the strong reasoning of *Dowell* becomes clear; namely, that once a return is filed which supplies both the requirement of section 6501(a) and of *Zellerback,* then the general statute of repose becomes available to a taxpayer.

V.

Factually and substantively "tax policy" considerations are not applicable to the issue.

Both the majority and the dissent in the Third Circuit disavow any role in "tax policy." However, whereas the dissent merely makes the statement, the majority clearly adopts the arguments of the Commissioner that the *Dowell* precedent interferes with his policy considerations. The majority, in effect, does permit these considerations to influence its decision. Both factually and substantively this is incorrect.

Factually the so-called policy considerations set forth by the majority do not reflect the facts in this case. The key sentence that ". . .It has long been the policy of the I.R.S. to defer civil assessments and collection until the completion of criminal proceeding" could have no application to the criminal and civil limitations periods which are involved with respect to the taxable years in issue. The earliest return, that for the taxable year 1965, was filed on April 15, 1966. The Commissioner had until April 16, 1972 to bring a criminal indictment. Later returns had later dates. On November 19, 1971 well within the criminal expiration date for the taxable year 1965 indictments were obtained for all the taxable years involved. The amended returns had been filed on August 17, 1971, three months before, and had been accepted by the Commissioner and were the basis for the section 7206(1) indictments. The tax reported on the returns was paid with the returns and was assessed immediately. It was not until six years later, November 21, 1977, that the statutory notices proposing the assessment of the 50% fraud penalty under section 6653(b) of the *Code* were issued. There could be no policy considerations to support this delay of more than six years after the securing of the indictments to support such a delay. The criminal proceedings had been concluded within the time frame of the three

year period of limitations commencing with the date of the filing of the amended returns. This expiration date would have been August 17, 1974. It was pure procrastination on the part of the Commissioner. This procrastination is demonstrated by the circumstance that there was no need for the period of six years, or indeed even of three. No investigation or audit was required. There remained only the assertion of 50% of the additional tax shown on the amended return over the original return. It is not possible to reconcile any policy consideration to these facts. The proposed assessments could well have been made within three years of the filing of the amended returns. The dictum of *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), 10 AFTR 2d 5279, cited by the Third Circuit is not apposite here. That case involved a dismissal of a refund suit based upon a motion made by the plaintiff taxpayer for discovery. The refund suit was contemporaneous in time with a criminal proceeding. The Fifth Circuit reversed the dismissal and remanded the case for a full trial on the merits. Apparently in that case what was involved was an abuse of discretion by the trial judge under the rules of discovery. In the instant situation, the criminal proceedings had concluded within the time frame of the three year period of limitations from the date of the filing of the amended returns.

The position of the Commissioner, as reflected by the majority opinion appears to be that he should have the aid of the judiciary in defeating any attempt to restrict his policy considerations; that the judiciary should, in effect be a party to his administrative policy. The answer to this approach is that this, or any other Court, should not be a partner with the executive branch of government. When the rationale, as expressed by the Tenth Circuit, and followed by the Tax Court, is well founded, the issue should be decided upon its merits, and not upon an appeal for administrative relief. The remedy lies within the Commissioner's own office; he need only to structure his administrative procedures to afford and guarantee due process to each and every taxpayer.

The civil sections of the Internal Revenue Code were never intended to be an adjunct to the criminal provisions, so as to be used only to aid the Commissioner in pursuing the latter. Congress did not intend when it promulgated section 6501 of the *Code* and its predecessor statutes, that such were mere adjuncts to the criminal statutes, the gratuitous statement made by the Third Circuit to such effect notwithstanding. There is nothing in legislative history of any of the statute of limitations sections to support such a statement.

The opinion of the majority in relying upon the argument that the discovery of fraud in a return is support for an unlimited period for assessment is misleading in the least. It ignores the fact that the amended return gives the Commissioner all the data and information he needs, and was lacking, in order to conduct his investigation. The assumption made by the Third Circuit's position is that the Commissioner's investigation is primarily to ascertain enough evidence to prove a fraud case, and only then he will make his tax deficiency determination. This places the proverbial cart before the horse. Experience in the auditing process demonstrates that the Commissioner first determines whether there is unreported income, and then he proceeds to a determination of the penalty under section 6653(b). Experience also reveals that he attempts to make all deficiency determinations within the normal three year period, even when a return is suspect. This is in order that the deficiency determination will thereby be preserved without the necessity of relying upon proof of fraud in order to keep the statute open. The Commissioner always seeks to preserve the determination of a deficiency in tax. The assertions of a fraud penalty is not merely to claim the advantage of section 6501(c)(1) but it is an additional determination. As a general rule the determination of the tax is made within the three year period, and the penalty is added to the tax determination. The error in Judge Parker's quoted dissent, and in the Third Circuit's statement, is that there is the implication that the Commissioner

needs longer than three years to gather evidence of fraud, even though he may have the evidence of unreported income. This hypothesis overlooks the fact that the gathering of evidence with respect to unreported income is contemporaneous with the marshalling of evidence to support fraudulent conduct. The two go hand-in-hand. This argument is simply not a correct appraisal of the administrative process.

Not to be overlooked is that the majority opinion has no problem in recognizing the correctness of *Bennett*. Yet the policy considerations he finds serious in this case are as equally compelling in a *Bennett* situation. There also, fraud is involved; there also, the matter of a criminal prosecution is present; there also, the Commissioner has the burden of ferreting out the fraud. Yet the majority would not hold that the general three year statute was not triggered by the filing of the delinquent return. To rely upon policy considerations in the instant cases, and not in *Bennett* just does not make good common sense.

CONCLUSION

Based upon the foregoing analysis, statutory construction and case law, the petitioners respectfully submit that the decision of the Third Judicial Circuit Court of Appeals be reversed.

Respectfully submitted,

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